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In The

Supreme Court of the United States

October Term, 1995

BENITO IADAROLA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

VICTOR IADAROLA,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of New York, Appellate Division, Second Department

PETITION FOR WRIT OF CERTIORARI

JEROME KARP
HOWARD ALTSCHULER,
Of Counsel
Attorneys for Petitioner
Benito Iadarola
26 Court Street
Brooklyn, New York 11241
(718) 852-4454

ALBERT BRACKLEY
Counsel of Record
Attorney for Petitioner
Victor Iadarola
16 Court Street
Brooklyn, New York 11241
(718) 625-5884

8445
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

50pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the FBI's long-term violation, over a period of ten years, of 28 U.S.C. § 533, the FBI Guidelines for Confidential Informants and related statutes, deprived petitioners of their constitutional rights to due process and a fair trial by the court below refusing to instruct the jury that petitioners' reasonable belief they were authorized to commit low-level criminal acts would negate the specific intent element of the crime with which they were charged, or, in the alternative, that a finding of entrapment by estoppel would merit acquittal.

II. Whether petitioners, both of whom were long-term undercover informants for the FBI and the Kings County N.Y. District Attorney's Office, and acknowledged by the FBI to be "essential" in providing information against organized crime, were deprived of their constitutional rights to due process and a fair trial by the court below refusing to charge the jury on their requested defense of lack of specific intent to commit the crimes upon their reasonable belief they were acting on the authority granted to them by said law enforcement officials.

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OPINION BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department (Pet. App. at 5a) is reported at *People v. Benito Iadarola*, 634 N.Y.S.2d 738, 1995 N.Y. App. Div. Lexis 12516. The Certificate Denying Leave of the State of New York Court of Appeals for *People v. Benito Iadarola* is unpublished. (Pet. App. at 1a).

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department (Pet. App. at 7a) is reported at *People v. Victor Iadarola*, 634 N.Y.S.2d 738, 1995 N.Y. App. Div. Lexis 12517. The Certificate Denying Leave of the State of New York Court of Appeals for *People v. Victor Iadarola* is unpublished. (Pet. App. at 3a).

STATEMENT OF JURISDICTION

Timely petitions for appeal were denied by the Court of Appeals of the State of New York by Certificates Denying Leave entered on December 20, 1995. (Pet. App. at 1a, 3a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same

> offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Sixth Amendment, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution, Fourteenth Amendment, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

> within its jurisdiction the equal protection of the laws.

28 U.S.C. § 533 provides:

> The Attorney General may appoint officials—(1) to detect and prosecute crimes against the United States; (2) to assist in the protection of the person of the President; and (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.
>
> This section does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies.

Other relevant statutes and regulations involved appear in the appendix: 28 U.S.C. § 534 (Pet. App. at 10a); 28 U.S.C. § 547 (Pet. App. at 12a); 28 C.F.R. § 0.85 (Pet. App. at 13a); 28 C.F.R. § 0.85a (Pet. App. at 17a); N.Y. Penal Law § 35.05 (Pet. App. at 18a); and N.Y. Penal Law § 460.20 (Pet. App. at 19a).

STATEMENT OF THE CASE

For many years prior to 1981, petitioners engaged in low-level, non-violent criminal activity involving mutual race horse policy operations where many of the bets placed were in the range of 10 to 25 cents. Recognizing that their positions as "bookies" with a successful numbers operation permitted petitioners to obtain confidential information regarding

organized crime, the FBI in 1981 recruited petitioners to act as confidential informants against the Bonnano and Gambino crime families. *See, e.g.*, Record Below (hereafter "R.") at pages 5026-27, 5054-55, 5339-40, 5346-47, 5402.

Several months after the petitioners began to work for the FBI, they were indicted by the Kings County of New York District Attorney's Office ("District Attorney") for various gambling charges. The FBI facilitated a plea bargain for the petitioners, with the understanding that the FBI would continue to use petitioners as confidential informants, supervise their activities, and forward any relevant confidential information supplied by petitioners to the District Attorney or other state law enforcement agencies.[1] R. at 5337, 5367-68, 5484-86.

The petitioners remained confidential informants over a period of ten years, working under the supervision of at least six different FBI agents (who also supervised petitioners on behalf of the District Attorney). R. at 5288. On approximately 100 occasions during those ten years, petitioners provided the FBI with undercover information on a wide variety of serious activities of organized crime, including highjacking, a triple murder and other homicides. R. at 5290-94. The FBI forwarded pertinent undercover information to local law enforcement authorities, including the Kings County District Attorney, as agreed in 1981, but without revealing to the state authorities that petitioners were the source of that information. *See, e.g.*, R. at

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1. One of the supervising FBI agents testified at trial as follows: "As I recall, what I had discussed with the assistant [King's County District Attorney] that was handling the case was that both the [Iadarolas] were providing information and assistance to me regarding federal investigations. I would like to continue to use them in that capacity and that if any information were generated by either of them or both of them that would relate to state investigations, that I would contact appropriate state authorities and pass that information onto them." R. at 5368-70.

5029, 5031, 5036, 5037, 5039-41, 5302-05, 5333-35, 5399-5400, 5485, 5649.

The importance of the information provided by petitioners for the federal and state fight against organized crime is illustrated by the fact that on at least two occasions, once in 1981 and again in 1989, petitioners' supervising FBI agents intervened on their behalf when petitioners faced indictment on state gambling charges.[2] When petitioners withdrew from the informant program in the mid-1980's, fearing reprisals from the Gambino crime family, FBI upper management actively sought to reinstate petitioners as informants because of their value as informants. R. at 5374. Even after the District Attorney informed the FBI that petitioners were targeted for indictment by state authorities, the FBI continued to use petitioners as informants, obtaining additional information on the Gambinos, Bonnanos and the number one target of both federal and New York state law enforcement authorities, John Gotti. R. at 5405-06, 5414.

Two of petitioners' supervising FBI agents presented undisputed testimony at trial that *(1)* the FBI considered petitioners to be "essential" informants in its fight against organized crime, R. at 5374, 5594, *(2)* since 1981, the FBI was aware of the nature (though not necessarily the extent) of petitioners' on-going criminal gambling activities, R. at 5368-71, 5542-43, 5595-97, *(3)* over the ten years, their supervising FBI agents explicitly discussed those on-going illegal activities with petitioners, R. at 5596-97, *(4)* those on-going criminal activities were the sole reason petitioners were able to obtain the information, R. at 5290, (5) petitioners were never ordered or asked to desist from those known activities, R. at 5290, 5349,

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2. The petitioners were so essential as informants that the FBI warned them of a wire-tap by the Kings County District Attorney's Office and an impending police raid of petitioners' gambling operation. *See, e.g.*, R. at 5042-45, 5048-49, 5119-20, 5194-96, 5383, 5391.

5476, 5594, and *(6)* if petitioners' gambling activities had ceased, the FBI would have terminated the services of petitioners, who, as law-abiding citizens, would have been of absolutely no undercover value to the law enforcement authorities. R. at 5290.

The FBI actively encouraged and supported petitioners' continuing participation as confidential informants. R. at 5374-75. One agent admitted that it was only due to his own inadvertence that proper authorization for petitioners' criminal activities was not obtained, a procedural oversight rather than a conscious decision by the FBI to withhold such authorization. R. at 5287. The agent also admitted that he never informed petitioners of his "inadvertent" omission to obtain authorization. R. at 5287, 5289. In contrast, petitioner Benito Iadarola testified the FBI agents specifically authorized petitioners to continue their criminal activity. R. at 5648-50.

However, the agents also testified that internal FBI Guidelines require that any informant who engages in unauthorized federal or state criminal activity must be immediately dismissed from the informant program.[3] R. at 5289-

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3. "[W]henever a Special Agent learns of the commission of a serious crime by an informant or confidential source, he shall notify a field office supervisor. The supervisor shall make a determination whether to notify appropriate state or local enforcement or prosecutive authorities of any violation of law and shall make a determination whether continued use of the informant or confidential source is justified . . . . In determining whether to notify appropriate state or local law enforcement or prosecutive authorities of criminal activity by FBI informants and confidential sources, the FBI shall consider: (a) whether the crime is completed, imminent or inchoate; (b) the seriousness of the crime in terms of danger to life and property; . . . (f) the effect of notification on FBI investigative activity. Clifford Zimmerman, *Toward a New Vision of Informants: A History of Abuses and Suggestions for Reform*, 22 Hastings Const. L. Q. 81, 177-78, n. 320 (1994) *quoting Attorney General's Guidelines on FBI Use of Informants and Confidential Sources* (hereafter "Toward a New Vision of Informants").

5290, 5473, 5595-96. *See, e.g., United States v. Phillips*, 854 F.2d 273, 275 (7th Cir. 1988). Despite the Guidelines' clear requirement for immediate termination, the agents used petitioners as informants from 1981 at least through June of 1990 though admittedly knowing that petitioners at all times engaged in the illegal gambling activities that served as the sole source of their undercover information to the FBI and the District Attorney's office.

A. Prior Legal Proceedings

The federal questions raised herein were timely and properly raised so as to give the Supreme Court jurisdiction to review the judgment on writ of certiorari.

i. At Trial

As a result of their gambling activities, petitioners were convicted by a jury of violating New York's Enterprise Corruption statute, Penal Law 460.20, which proscribes intentionally participating in and advancing the affairs of a criminal enterprise Pet. App. at 19a.

During trial, defense counsel requested that the trial judge charge the jury with instructions on direct authority, apparent authority, and that petitioners, as confidential informants of ten years standing, had a reasonable belief that they were acting as authorized agents in assistance to law enforcement activity. The defense also submitted to the trial court the following request to charge, adopted from the case of *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976):

> If a person engages in conduct which violates a criminal statute with the reasonable belief

> that he or she is acting as an authorized government agent to assist in law enforcement activity, then that person may not be convicted of violating the criminal statute because the criminal intent is lacking."

The trial court made it clear that none of the requested instructions would be presented to the jury. R. at 3169, 5229, 5450, 5516-23. The court stated it would only charge the jury that the petitioners intended to commit the crime, and could only be acquitted if the jury found they were justified in intentionally committing those crimes as a "public servant" pursuant to New York Penal Law § 35.05. R. at 5450. Pet. App. at 18a. The trial court insisted that petitioners had to show they were agents of the FBI, acting under explicit authority. R. at 5134.

ii. Appellate Division

On appeal to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, petitioners renewed the objections raised at trial that the State must prove beyond a reasonable doubt the petitioners' intention to commit the crime charged, citing as support the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. While the Appellate Division conceded that there was evidence presented suggesting petitioners were FBI informants, it stated "there is no proof that the defendant[s] did not intend to participate in the gambling enterprise with which [they were] so charged." ***People v. Victor Iadarola***, 634 N.Y.S. 2d 738, 1995 N.Y. App. Div. Lexis 12517.

The Appellate Division held incorrectly that the reasonable belief defense (also known as entrapment by estoppel) has no

basis in New York law,[4] ignoring, as did the trial court, a long line of New York and federal cases to the contrary, as well as the FBI's violation of 28 U.S.C. § 533 and its internal Guidelines.

iii. Court of Appeals

The Court of Appeals let stand, without comment, the Appellate Division decision by denying petitioners' request for leave to appeal.

REASONS FOR GRANTING THE PETITION

I.

THE FBI'S VIOLATION OVER A TEN-YEAR PERIOD OF 28 U.S.C. § 533 AND THE FBI GUIDELINES REGARDING CONFIDENTIAL INFORMANTS CONSTITUTIONALLY COMPEL INSTRUCTIONS TO THE JURY REGARDING PETITIONERS' SPECIFIC INTENT AND ESTOPPEL AGAINST THE GOVERNMENT.

The Due Process Clause of the Fifth Amendment, the Compulsory Process or Confrontation Clauses of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment of the Constitution guarantee a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). *See also*, *United States v. Abcasis*, 45 F.3d 39, 45 (2d Cir. 1995), *Williams v. Lord*,

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4. *See, e.g., People ex rel. Hegeman v. Corrigan*, 195 N.Y. 1, 12, 87 N.E. 792 (1909) ("[I]t is very apparent that the innocence or criminality of the intent in a particular act generally depends on the knowledge or belief of the actor at the time. An honest and reasonable belief in the existence of circumstances which, if true, would make the act for which the petitioner is prosecuted innocent, would be a good defense.")

996 F.2d 1481, 1483 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1073 (1994). An essential dimension of that meaningful opportunity is an instruction to a jury for "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *United States v. Goldson*, 954 F.2d 51, 55 (2d Cir. 1992), (*quoting Mathews v. United States*, 485 U.S. 58, 63, 108 S. Ct. 883, 887 (1987)). The decisions below threaten to unsettle this fundamental legal principle and unconstitutionally widen the scope of criminal activities that law enforcement officials may authorize informants to engage in during an investigation.

In *Sherman v. United States*, 356 U.S. 369 (1958), this Court held that the government could not make use of an informant and then claim disassociation through ignorance of the way in which he operated. "Informant mishandling and misconduct victimizes many innocent people. Examples of the resulting harm include: prosecutions based upon informant perjury; false arrests due to unreliable informants; non-disclosure of informant information by prosecutors in criminal proceedings; informant abuses promoted through rewards; and felonious activity committed with the knowledge and, at times, assent of the police and prosecutors." *Toward a New Vision of Informants* at 83 (1994).

Congress has encouraged the use of confidential informants as "an effective means — sometimes the only effective means — of detecting, investigating, successfully prosecuting, and thereby deterring [concealed offenses, such as crimes committed by highly sophisticated, well-insulated criminal organizations and consensual crimes, including official corruption]." Katherine Goldwasser, *After Abscam: An Examination of Congressional Proposal to Limit Targeting Discretion in Federal Undercover Investigations,* 36 Emory L.J. 75, 78 (1987). *See also Sorrels v. United States,* 287 U.S. 435, 453-54 (1932). Congress has also enacted specific statutory provisions manifesting a policy judgment that the FBI should abide by its

internal Guidelines, and communicate to the proper authorities the commission of crimes made pursuant to its investigations. Pursuant to 28 U.S.C. § 533, officials of Federal Bureau of Investigation have a legal duty to take whatever steps are necessary to bring criminal charges against suspect criminals, including timely informing prosecutorial authorities in the Department of Justice that crime has allegedly been committed. This duty is especially applicable where the FBI's own informants have been involved in criminal activity. *See, e.g., Bergman v. United States*, 565 F. Supp. 1353 (W.D. Mich. 1983). *Cf. Department of Justice v. Landano*, 508 U.S. 165 (1993) (investigating state crimes is part of FBI's investigative power).

As petitioners noted on appeal below, the FBI Guidelines and § 533 established an affirmative duty for petitioners' government supervisors to not only have terminated their services early on, but to have reported petitioners' allegedly unauthorized criminal activities to the same District Attorney's office that had been the recipient of petitioners' confidential information. However, the issue here is not whether these Guidelines create a legal right for petitioners to sue the government, but whether § 533 and the Guidelines constitutionally compel an instruction to the jury regarding petitioners' intent and estoppel against the government. *See, e.g., Payton v. United States*, 679 F.2d 475 (5th Cir. Unit B 1982) (holding that when government undertakes to perform services which would not be required in the absence of specific legislation, it will be liable if these activities are performed negligently), *Liuzzo v. United States*, 508 F. Supp. 923 (E.D. Mich. 1981) (holding that an assertion that the Government, through the wrongful acts of FBI informant and agents was responsible for a murder, attacked the implementation of the FBI's policy regarding the use of informants but not the discretionary policy itself, and therefore, such claims were not barred under the discretionary function exception to the Federal Tort Claims Act).

The lower court's decision unravels nearly three decades of congressional legislation aimed at curbing the abuses of federal law enforcement and increasing the effectiveness of the war against organized crime.[5] Congress has recognized the special value of informants, the importance of their missions and the risks they endure. For example, to encourage the participation of informants, statutory safeguards protect their privacy and identity.[6] Congress has acted because organized crime costs Americans "more than all other types of crime combined, and just about double the amount spent annually in the United States for all police, court and correction work." *In re Persico*, 522 F.2d 41, 47 (2d Cir. 1975) (quoting Cressey, *Organized Crime and Criminal Organizations* 10-11 (1971). Thus it is not surprising that the FBI made every effort, including intercession with local authorities, to maintain petitioners as informants when they had proven themselves to be of such great value in the fight against organized crime.

Organized criminals focus on consensual crimes, such as drug and weapons trafficking, prostitution, and gambling. "Such transactions are the most difficult crimes to detect because they typically occur in private between willing participants who rarely complain to the police. Because of the difficulties inherent in detecting and successfully prosecuting consensual crimes, federal and state law enforcement agencies often use undercover agents and informants in their efforts to expose the offenses."

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5. "All of these guidelines state that laws should not be violated and — that any criminal conduct should be reported to local law enforcement authorities. *Toward a New Vision of Informants* at 133, *citing Attorney General's Guidelines on Criminal Investigations of Individuals and Organizations.*

6. *See, e.g.*, 5 U.S.C. §552a(k)(5), 5 U.S.C. § 552(b)(7)(C). That explains in part why the FBI did not reveal petitioners as the source of information provided to the District Attorney from 1981 through 1990.

Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses, in Federal Court*, 27 Wake Forest L. Rev. 829, 831 (1992). Government agents are also motivated to competently supervise their informants by legal necessity. Before one can act as informant he or she must go through a suitability and pertinence review. R. at 5278. The agents have to provide an affidavit as to the reliability of an informant if the information provided by that informant is the basis of a request for a search warrant or a wire tap. *See, e.g., Morrow v. State*, 249 S.E. 2d 110 (Ga. 1978), *cert. denied*, 440 U.S. 917 (1979). On several occasions, petitioners provided the government with information used to justify requests for wire tapping, search warrants and camera surveillance. R. at 5334-35, 5583.

At some point after 1981 when petitioners first became informants, but years before 1991 when they were ultimately indicted, their law enforcement supervisors had an obligation to inform the petitioners that their known gambling activities exceeded the scope of the FBI Guidelines. This responsibility was particularly acute considering the fact that the agents themselves testified that the petitioners' gambling activities were the only reason petitioners were kept as informants. The conclusion that petitioners were never reported or terminated because their activities were authorized and within the Guidelines is buttressed by the trial testimony by one of the supervising FBI agents that if unauthorized criminal acts are committed by an informant, "the Bureau cannot intercede." R. at 5175. It is undisputed that the Bureau did intercede on at least two occasions, 1981 and 1989. These intercessions could have affected the petitioners' specific intent and the jury should have been so instructed.

A finding petitioners were entitled to jury instructions on "reasonable belief" and "entrapment by estoppel" will promote

the underlying policies behind the use of confidential informants to assist law enforcement agencies in their criminal investigation and will not in any way undermine the correct enforcement of a particular law. *United States v. Corso*, 20 F.3d 521 (2d Cir. 1994). First, it will encourage government law enforcement officials to better know and articulate the law and to follow standard procedures.[7] *United States v. Etheridge*, 932 F.2d 318, 321 (4th Cir. 1991), *cert. denied*, 502 U.S. 917 (1991). Second, it will protect a fundamental constitutional principle of due process and fairness. Third, the government has a compelling interest to maintain the integrity of confidential informant program.

Organized crime investigations often take years of careful, painstaking and dangerous undercover operations.[8] If the case below stands, law enforcement authorities, in their national war against organized crime, will be given a constitutional green light to knowingly engage the services of long-term confidential

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7. Congress has enacted other statutes imposing a duty on the FBI to collect and exchange information with "authorized officials of the Federal Government, the States, cities, and penal and other institutions." 28 U.S.C. §§ 534(a)(1) & (a)(4). The Director of the Federal Bureau of Investigation is required to "[i]nvestigate violations of the laws . . . of the United States and collect evidence in cases in which the United States is or maybe a party in interest." 28 C.F.R. § 0.85(a) (1982). Subsection (g) further requires that the FBI operate its laboratory to assist "all duly constituted law enforcement agencies." Courts interpreting § 28 U.S.C. § 547 have consistently ruled that this statute does not exempt United States Attorneys from their obligations to act fairly and with proper deference to the rights of the accused.

8. *See, e.g., United States v. Gambino*, 59 F.3d 353 (2d Cir. 1995) ("The Gambino organization, one of the most notorious organized crime families in the United States, was the subject of a series of investigations that involved an immense amount of electronic surveillance. These investigations, which culminated in the conviction of the organization's leader, John Gotti, along with other high-ranking members, was a much-trumpeted triumph for law enforcement.").

informants whose violations of state law are the sole source of their information, without a concomitant requirement that the law enforcement agencies dismiss the informants or that a jury be permitted to consider the effect of such long-term engagement on a defendant's intent to commit a crime or to estop the government from prosecution.

II.

THE DECISION BELOW UNSETTLES A FUNDAMENTAL PRECEPT OF CONSTITUTIONAL LAW THAT A DEFENDANT IS ENTITLED TO AN INSTRUCTION AS TO ANY RECOGNIZED DEFENSE FOR WHICH THERE EXISTS EVIDENCE SUFFICIENT FOR A REASONABLE JURY TO FIND IN HIS FAVOR.

"It is hornbook law that an accused is entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it." *United States v. Rodriguez*, 858 F.2d 809, 812 (1st Cir. 1988). This fundamental precept has been endorsed by every single federal circuit.[9] Even when the supporting evidence is weak or of doubtful credibility, its presentation at trial requires an instruction on the theory of defense. *United States v. Garner*, 529 F.2d 962, 970 (6th Cir. 1976) (citations omitted), *cert. denied*, 429 U.S. 850. A "criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may

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9. *See, e.g., Virgin Islands v. Isaac*, 50 F.3d 1175, 1180 (3d Cir. 1995); *United States v. Grissom*, 44 F.3d 1507, 1512 (10th Cir. 1995), *cert. denied*, 115 S. Ct. 1720 (1995); *United States v. Brown*, 33 F.3d 1002, 1004 (8th Cir. 1994); *United States v. Maseratti*, 1 F.3d 330, 336 (5th Cir. 1993); *United States v. McGill*, 953 F.2d 10, 12 (1st Cir. 1992); *United States v. Simas*, 937 F.2d 459, 462 (9th Cir. 1991); *United States v. Gibbs*, 904 F.2d 52, 58 (D.C. Cir. 1990); *United States v. Alston*, 895 F.2d 1362, 1367 (11th Cir. 1990).

appear to the trial court." *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990). Upon defendant's request, the court must instruct the jury on the defense if it is sufficiently supported by the evidence; failure to do so may constitute reversible error. *People v. Watts*, 57 N.Y.2d 299, 301 (1982).

It is the province of the jury to determine the credibility of the evidence. *United States v. Timberlake*, 559 F.2d 1375 (5th Cir. 1977) (failing to instruct on a theory of defense for which there is any foundation in the evidence is reversible error). Therefore, if there was any basis whatsoever to support a theory of reasonable belief[10] or entrapment by estoppel, the jury should have been so instructed to consider that in its deliberations.

At trial, evidence was presented that for ten years the FBI retained and supervised petitioners as informants only because petitioners successfully engaged in the very criminal activities for which they were ultimately convicted. Petitioners were constitutionally entitled to a jury instruction that this evidence could be considered either to negate petitioners' intent to commit the criminal acts charged or else to estop the government from prosecution.[11] When there is sufficient evidence presented, "the right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to

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10. A reasonable belief that one has been authorized to commit an illegal act is an established defense in New York when, as here, specific intent is an element of the offense. *People v. Marrero*, 69 N.Y. 2d 382, 390, 507 N.E.2d 1068, 1072, 515 N.Y.S. 2d 212, 216 (1987). *See also People v. Weiss*, 276 N.Y. 384, 12 N.E. 2d 514 (1938).

11. *Compare United States v. Opdahl*, 930 F.2d 1530 (11th Cir. 1991) (refusing to instruct jury on legal authority of IRS official to reach compromise to settle delinquent taxpayer's disputed liability was reversible error where instruction was central to defense theory of case that defendant intended his payment to undercover investigator to be legitimate settlement of his tax liability, and was supported by some evidence).

instruct . . . can never be considered harmless error." *United States v. Escobar De Bright*, 742 F.2d 1196, 1201 (9th Cir. 1984). Since the justification jury instruction charged by the trial judge could only be considered after the jury had determined that petitioners intentionally committed the offense, the jury was deprived of its ability to determine petitioners' states of mind,[12] and the petitioners were deprived of their constitutional right to have their guilt determined beyond a reasonable doubt. The petitioners were entitled to have a jury decide whether the failure of the FBI to abide by its § 533 and its own internal Guidelines affected petitioners intent to commit the crimes charged, or else estopped the State government from prosecution, which agreed in 1981 to allow the FBI to supervise petitioners on the state's behalf in return for providing the state information obtained from petitioners.[13]

In *United States v. Abcasis*, 45 F.3d 39, 42-3 (2d Cir. 1995), the Second Circuit held that that conviction of a defendant is barred when the "commission of the crime arises from government solicitation or suggestion, coupled with a reasonable belief on the part of the defendant that he was authorized by agents of the government to commit the acts." The

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12. The trial judge below stated "There is no such thing as lack of intent. I am not going to charge that. I am not going to say they have to show they intended to commit the crime. There is no question they did intend to commit the crime. That's not the defense, and if it is the defense, they are on their own and I won't let them argue that to the jury." (Vol. 6: 5450-51).

13. *Compare Beard v. Mitchell*, 604 F.2d 485, 495 (7th Cir. 1979) (FBI supervising agent "was entitled to prove that his belief in the legality of his acts was reasonable but was not required to prove that his conduct was reasonable. The questions are distinct. For example, if the jury members had determined that it was grossly unreasonable for [defendant] to use a criminal informant, they still could have exonerated him if they found that he was merely acting in accordance with FBI guidelines in the reasonable belief that such conduct would thereby be lawful.").

Abcasis court stated that even the mere request by government agents for "continuing delivery of information could easily have been understood as authorization." *Id.* at 44. "The doctrine of entrapment by estoppel "depends on the unfairness of prosecuting one who has been led by the conduct of government agents to believe his acts were authorized." *Id.*

At least one state court has applied an entrapment by estoppel analysis in its review of a state criminal case. *Commonwealth v. Twitchell*, 617 N.E. 2d 609 (Mass. 1993). The *Twitchell* court found that there was "a substantial risk of a miscarriage of justice" as a result of the trial court's failure to charge the jury on the affirmative defense that the Twitchells reasonably believed that they could rely on the state law provision providing for spiritual treatment without fear of criminal prosecution. *Twitchell*, 617 N.E. 2d at 612-13. And, at least one New York case specifically held that, under certain circumstances, the state government may be estopped from pursuing a criminal prosecution as a result of its conduct. *People v. Donovan*, 53 Misc. 2d 687, 689, 279 N.Y.S. 2d 404, 407 (1967) (holding the state was estopped from prosecuting drunk defendant instructed by the police to drive away after finding her sleeping in her car). "In determining whether a factual basis for the instruction [of entrapment by estoppel] exists, the evidence must be reviewed in the light most favorable to the defendant." *United States v. Billue*, 994 F.2d 1562, 1568 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 939 (1994).

While it is true that a government's passive tolerance of a private informant's criminal conduct may be less egregious than conscious direction or enticement, at some point passive tolerance merits estoppel or a jury instruction regarding a defendant's intent or government misconduct. *Cf. United States v. Simpson*, 813 F.2d 1462, 1466 (9th Cir. 1987), *cert. denied*, 484 U.S. 898. The petitioners' supervising agents testified they

informed petitioners of the Guidelines. If true, petitioners were thus told they would be dismissed if they engaged in unauthorized criminal activity. Since the FBI agents admitted at trial that, over the years, they discussed with petitioners the criminal activity for which they were ultimately convicted, simply not being dismissed as an informant would lead a reasonable person, some time before ten years, to believe those actions were authorized by the FBI

Justice Holmes observed that while "it is not likely that a criminal carefully will consider the text of the law before he murders or steals, it is reasonable that a fair warning be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Due process and fair notice require that two things be made clear: first, the line distinguishing the lawful from the unlawful, and second, what the law intends to do if that line is crossed. To disallow the application of this defense to the instant case would "sanction an indefensible sort of entrapment by the State." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965), (*citing Raley v. Ohio*, 360 U.S. 423 (1959).

That petitioners were not able to present these arguments to the jury is a result inconsistent with accepted Supreme Court precedents, common sense, and public policy. "[I]t offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall*, 357 U.S. 513, 523 (1958).

CONCLUSION

The petition for a writ of certiorari should be granted. Petitioners submit that this appeal brings before the court substantial federal questions which require plenary consideration, with briefs on the merits and oral argument, for their resolution. In the alternative, petitioners respectfully request this Court issue a summary reversal.

Respectfully submitted,

ALBERT BRACKLEY
Counsel of Record
Attorney for Petitioner
Victor Iadarola
16 Court St.
Brooklyn, NY 11241
(718) 625-5884

JEROME KARP
HOWARD ALTSCHULER,
Of Counsel
Attorneys for Petitioner

APPENDIX A —CERTIFICATE DENYING LEAVE OF THE COURT OF APPEALS, STATE OF NEW YORK DATED DECEMBER 20, 1995

State of New York
Court of Appeals

BEFORE: HON. HOWARD A. LEVINE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

BENITO IADAROLA,

Appellant.

CERTIFICATE DENYING LEAVE

I, HOWARD A. LEVINE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. The request for a stay is denied as academic.

---

* Description of Order: Order of the Appellate Division, Second Department of December 4, 1995 affirming a judgment of Supreme Court, Kings County rendered July 6, 1994

Appendix A

Dated at Albany, New York
December 20, 1995

s/ Howard A. Levine
Associate Judge

APPENDIX B — CERTIFICATE DENYING LEAVE OF THE COURT OF APPEALS, STATE OF NEW YORK DATED DECEMBER 20, 1995

State of New York
Court of Appeals

BEFORE: HON. HOWARD A. LEVINE, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

VICTOR IADAROLA,

Appellant.

CERTIFICATE DENYING LEAVE

I, HOWARD A. LEVINE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied. The request for a stay is denied as academic.

---

* Description of Order: Order of the Appellate Division, Second Department of December 4, 1995 affirming a judgment of Supreme Court, Kings County rendered July 6, 1994

Appendix B

Dated at Albany, New York
December 20, 1995

s/ Howard A. Levine
Associate Judge

APPENDIX C — OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

PEOPLE V. BENITO IADAROLA

94-06442

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

634 N.Y.S.2d 738; 1995 N.Y. App. Div. LEXIS 12516

November 13, 1995, Argued
December 4, 1995, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: Appeal by the defendant from a judgment of the Supreme Court, Kings County (Rappaport, J.), rendered July 6, 1994, convicting him of enterprise corruption, upon a jury verdict, and imposing sentence. *1

DISPOSITION: ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County, for further proceedings pursuant to CPL 460.50(5).

COUNSEL: Jerome Karp, Brooklyn, N.Y. (Howard Altschuler on the brief), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Roseann B. MacKechnie, Michael Gore, Ann Bordley, and William M. Harrington of counsel), for respondent.

Appendix C

JUDGES: WILLIAM C. THOMPSON, J.P., DAVID S. RITTER, DANIEL W. JOY, ANITA R. FLORIO, JJ.

OPINION: DECISION & ORDER

The defendant argues, similarly to his codefendant (see, *People v. Victor Iadarola,* A.D.2d [decided herewith]), that the trial court erred by failing to instruct the jury that he should be acquitted if he reasonably believed that the Federal Bureau of Investigation (hereinafter the F.B.I.) had authorized him to engage in criminal activities in connection with his role as a confidential [*2] informant. This defense, as set forth in *United States v. Abcasis* 634 N.Y.S.2d 738; 1995 N.Y. App. Div. LEXIS 12516, *2 (45 F.3d 39), has no basis in New York law. The trial court properly and adequately instructed the jury that, if it found the defendant guilty of the crimes with which he was charged, it should then consider whether the defendant's actions were justified pursuant to Penal Law § 35.05(1), which provides in pertinent part that criminal conduct is justified and not criminal if it is performed by a public servant in the reasonable exercise of his duties. In any event, no reasonable view of the evidence that was adduced at trial supports this defense.

The defendant's sentence is not excessive (see, *People v. Suitte,* 90 A.D.2d 80, 455 N.Y.S.2d 675).

THOMPSON, J.P., RITTER, JOY and FLORIO, JJ., concur.

APPENDIX D — OPINION OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

PEOPLE V. VICTOR IADAROLA

94-06445

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

634 N.Y.S.2d 738; 1995 N.Y. App. Div. LEXIS 12517

November 13, 1995, Argued
December 4, 1995, Decided

NOTICE: [*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY: Appeal by the defendant from a judgment of the Supreme Court, Kings County (Rappaport, J.), rendered July 6, 1994, convicting him of enterprise corruption, upon a jury verdict, and imposing sentence. 634 N.Y.S.2d 738; 1995 N.Y. App. Div. LEXIS 12517, *1

DISPOSITION: ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Kings County for further proceedings pursuant to CPL 460.50(5).

COUNSEL: Albert J. Brackley, Brooklyn, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Roseann B. MacKechnie, Michael Gore, Ann Bordley, and William M. Harrington of counsel), for respondent.

Appendix D

JUDGES: WILLIAM C. THOMPSON, J.P., DAVID S. RITTER, DANIEL W. JOY, ANITA R. FLORIO, JJ.

OPINION: DECISION & ORDER

The defendant's conviction arose from his participation with his brother (see, People v. Benito Iadarola, A.D.2d [decided herewith]) and others in a pattern of illegal gambling activity from November 1988 to July 1991. The defendant contends that the People failed to prove his guilt beyond a reasonable doubt. Viewing the evidence in the light most favorable to the People (*People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find [*2] that it is legally sufficient to establish the defendant's guilt beyond a reasonable doubt. The defense of justification was disproven by the People beyond a reasonable doubt (see, Penal Law § 25.00[1]; § 35.05[1]).

Contrary to the defendant's contention, the trial court properly denied the defendant's request to charge the jury that he lacked the intent to commit the crimes with which he was charged because, as a confidential informant, he had a reasonable belief that the Federal Bureau of Investigation (hereinafter the F.B.I.) had given him the authority to commit those crimes. There is no proof that the defendant did not intend to participate in the gambling enterprise with which he was charged. However, in view of the fact that the defendant presented evidence suggesting that he was an F.B.I. informant, the trial court properly instructed the jury that, if it found the defendant guilty of the crime of enterprise corruption, it should then consider whether the defendant's actions were justified pursuant to Penal Law § 35.05(1), which provides in pertinent part that criminal conduct is justified and not criminal if it is performed by a public servant in the reasonable exercise [*3] of his duties.

Appendix D

The defendant's sentence is not excessive (see, *People v. Suitte*, 90 A.D.2d 80, 455 N.Y.S.2d 675).

THOMPSON, J.P., RITTER, JOY and FLORIO, JJ., concur.

APPENDIX E — RELEVANT STATUTES AND REGULATIONS

28 U.S.C. § 534

Acquisition, preservation, and exchange of identification records and information; appointment of officials

(a) The Attorney General shall —

(1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records;

(2) acquire, collect, classify, and preserve any information which would assist in the identification of any deceased individual who has not been identified after the discovery of such deceased individual;

(3) acquire, collect, classify, and preserve any information which would assist in the location of any missing person (including an unemancipated person as defined by the laws of the place of residence of such person) and provide confirmation as to any entry for such a person to the parent, legal guardian, or next of kin of that person (and the Attorney General may acquire, collect, classify, and preserve such information from such parent, guardian, or next of kin);

(4) exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.

(b) The exchange of records and information authorized by subsection (a)(4) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.

(c) The Attorney General may appoint officials to perform the functions authorized by this section.

(d) For purposes of this section, the term "other institutions" includes —

(1) railroad police departments which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers; and

(2) police departments of private colleges or universities which perform the administration of criminal justice and have arrest powers pursuant to a State statute, which allocate a substantial part of their annual budget to the administration of criminal justice, and which meet training requirements established by law or ordinance for law enforcement officers.

(e)(1) Information from national crime information databases consisting of identification records, criminal history records, protection orders, and wanted person records may be disseminated to civil or criminal courts for use in domestic violence or stalking cases. Nothing in this subsection shall be construed to permit access to such records for any other purpose.

(2) Federal and State criminal justice agencies authorized to enter information into criminal information databases may include —

(A) arrests, convictions, and arrest warrants for stalking or domestic violence or for violations of protection orders for the protection of parties from stalking or domestic violence; and

(B) protection orders for the protection of persons from stalking or domestic violence, provided such orders are subject to periodic verification.

(3) As used in this subsection —

(A) the term "national crime information databases" means the National Crime Information Center and its incorporated criminal history databases, including the Interstate Identification Index; and

(B) the term "protection order" includes an injunction or any other order issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final orders issued by civil or criminal courts (other than support or child custody orders) whether obtained by filing an independent action or as a pendente lite order in another proceeding so long as any civil order was issued in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection.

28 U.S.C. § 547

Duties

Except as otherwise provided by law, each United States attorney, within his district, shall —

(1) prosecute for all offenses against the United States;

(2) prosecute or defend, for the Government, all civil actions, suits or proceedings in which the United States is concerned;

(3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;

(4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and

(5) make such reports as the Attorney General may direct.

28 C.F.R. 0.85

PART 0 — ORGANIZATION OF THE DEPARTMENT OF JUSTICE, SUBPART P — FEDERAL BUREAU OF INVESTIGATION, @ 0.85 General functions.

The Director of the Federal Bureau of Investigation shall:

(a) Investigate violations of the laws, including the criminal drug laws, of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise specifically assigned to another investigative agency. The Director's authority to investigate violations of and collect evidence in cases involving the criminal drug laws of the United States is concurrent with such authority of the Administrator of the Drug Enforcement Administration under @ 0.100 of this part. In investigating violations of such laws and in collecting evidence in such cases, the Director may exercise so much of the authority vested in the Attorney General by sections 1 and 2 of

Appendix E

Reorganization Plan No. 1 of 1968, section 1 of Reorganization Plan No. 2 of 1973 and the Comprehensive Drug Abuse Prevention and Control Act of 1970, as amended, as he determines is necessary. He may also release F.B.I. information on the same terms and for the same purposes that the Administrator of the Drug Enforcement Administration may disclose DEA information under @ 0.103 of this part. The Director and his authorized delegates may seize, forfeit and remit or mitigate the forfeiture of property in accordance with 21 U.S.C. 881, 21 C.F.R. 1316.71 through 1316.81, and 28 C.F.R. 9.1 through 9.7.

(b) Conduct the acquisition, collection, exchange, classification and preservation of fingerprint cards and identification records from criminal justice and other governmental agencies, including fingerprint cards voluntarily submitted by individuals for personal identification purposes; provide expert testimony in Federal, State and local courts as to fingerprint examinations; and provide fingerprint training and provide identification assistance in disasters and for other humanitarian purposes.

(c) Conduct personnel investigations requisite to the work of the Department of Justice and whenever required by statute or otherwise.

(d) Carry out the Presidential directive of September 6, 1939, as reaffirmed by Presidential directives of January 8, 1943, July 24, 1950, and December 15, 1953, designating the Federal Bureau of Investigation to take charge of investigative work in matters relating to espionage, sabotage, subversive activities, and related matters.

(e) Establish and conduct law enforcement training programs to provide training for State and local law enforcement personnel; operate the Federal Bureau of Investigation National Academy; develop new approaches, techniques, systems, equipment, and devices to improve and strengthen law enforcement and assist in conducting State and local training programs, pursuant to section 404 of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 204.

(f) Operate a central clearinghouse for police statistics under the Uniform Crime Reporting Program, and a computerized nationwide index of law enforcement information under the National Crime Information Center.

(g) Operate the Federal Bureau of Investigation Laboratory to serve not only the Federal Bureau of Investigation, but also to provide, without cost, technical and scientific assistance, including expert testimony in Federal or local courts, for all duly constituted law enforcement agencies, other organizational units of the Department of Justice, and other Federal agencies, which may desire to avail themselves of the service. As provided for in procedures agreed upon between the Secretary of State and the Attorney General, the services of the Federal Bureau of Investigation Laboratory may also be made available to foreign law enforcement agencies and courts.

(h) Make recommendations to the Office of Personnel Management in connection with applications for retirement under 5 U.S.C. 8336(c).

(i) Investigate alleged fraudulent conduct in connection with operations of the Department of Housing and Urban Development and other alleged violations of the criminal

provisions of the National Housing Act, including 18 U.S.C. 1010.

(j) Exercise the power and authority vested in the Attorney General to approve and conduct exchanges of identification records with officials of federally chartered or insured banking institutions to promote or maintain the security of those institutions and, if authorized by State statute and approved by the Attorney General, to officials of State and local governments for purposes of employment and licensing; and exercise the power and authority vested in the Attorney General by 15 U.S.C. 78q(f)(2) and 7 U.S.C. 12a, to approve and conduct exchanges of identification records with certain segments of the securities industry and the Commodity Futures Trading Commission, respectively.

(k) Payment of awards (including those over $ 10,000) under 28 U.S.C. 524(c)(2), and purchase of evidence (including the authority to pay more than $ 100,000) under 28 U.S.C. 524(c)(1)(F).

(l) Exercise Lead Agency responsibility in investigating all crimes for which it has primary or concurrent jurisdiction and which involve terrorist activities or acts in preparation of terrorist activities within the statutory jurisdiction of the United States. Within the United States, this would include the collection, coordination, analysis, management and dissemination of intelligence and criminal information as appropriate. If another Federal agency identifies an individual who is engaged in terrorist activities or in acts in preparation of terrorist activities, that agency is requested to promptly notify the F.B.I.. Terrorism includes the unlawful use of force and violence against persons or property to intimidate or coerce a

government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

(m) Carry out the Department's responsibilities under the Hate Crime Statistics Act.

(n) Exercise the authority vested in the Attorney General under section 528(a), Public Law 101-509, to accept from federal departments and agencies the services of law enforcement personnel to assist the Department of Justice in the investigation and prosecution of fraud or other criminal or unlawful activity in or against any federally insured financial institution or the Resolution Trust Corporation, and to coordinate the activities of such law enforcement personnel in the conduct of such investigations and prosecutions.

(o) Carry out the responsibilities conferred upon the Attorney General under the Communications Assistance for Law Enforcement Act, Title I of Pub. L. 103-414 (108 Stat. 4279), subject to the general supervision and direction of the Attorney General.

28 C.F.R. 0.85a

Criminal justice policy coordination.

The Federal Bureau of Investigation shall report to the Attorney General on all its activities.

Appendix E

New York Penal Law § 35.05

Justification; generally

Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when:

1. Such conduct is required or authorized by law or by a judicial decree, or is performed by a public servant in the reasonable exercise of his official powers, duties or functions; or

2. Such conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a defense.

Appendix E

New York Penal Law § 460.20

Enterprise corruption

1. A person is guilty of enterprise corruption when, having knowledge of the existence of a criminal enterprise and the nature of its activities, and being employed by or associated with such enterprise, he:

(a) intentionally conducts or participates in the affairs of an enterprise by participating in a pattern of criminal activity; or

(b) intentionally acquires or maintains any interest in or control of an enterprise by participating in a pattern of criminal activity; or

(c) participates in a pattern of criminal activity and knowingly invests any proceeds derived from that conduct, or any proceeds derived from the investment or use of those proceeds, in an enterprise.

2. For purposes of this section, a person participates in a pattern of criminal activity when, with intent to participate in or advance the affairs of the criminal enterprise, he engages in conduct constituting, or, is criminally liable for pursuant to section 20.00 of this chapter, at least three of the criminal acts included in the pattern, provided that:

(a) Two of his acts are felonies other than conspiracy;

(b) Two of his acts, one of which is a felony, occurred within five years of the commencement of the criminal action; and

Appendix E

(c) Each of his acts occurred within three years of a prior act.

3. For purposes of this section, the enterprise corrupted in violation of subdivision one of this section need not be the criminal enterprise by which the person is employed or with which he is associated, and may be a legitimate enterprise.

Enterprise corruption is a class B felony.

(2)

No. 95-1507

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BENITO IADAROLA,

Petitioner,

—vs.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

VICTOR IADAROLA,

Petitioner,

—vs.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES J. HYNES
District Attorney
Kings County

ROSEANN B. MACKECHNIE
VICTOR BARALL*
ANN BORDLEY
Assistant District Attorneys
of Counsel

210 Joralemon Street
Brooklyn, New York 11201
(718) 250-2000

**Counsel of Record for Respondent*

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QUESTIONS PRESENTED

1. Whether this Court should grant *certiorari* to review the petitioners' claim that the state trial court violated their federal constitutional rights by failing to submit a certain defense to the jury, even though that claim does not raise a substantial federal question, that claim was not decided by the state courts, that claim does not raise an important issue of constitutional law, and that claim is utterly meritless, given the facts of this case.

2. Whether this Court should grant *certiorari* to review the petitioner's claim that the trial court's intent charge was constitutionally inadequate, even though that claim does not raise a substantial federal question, that claim was not decided by the state courts, that claim does not raise an important issue of constitutional law, and that claim is frivolous.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1507

BENITO IADAROLA,

Petitioner,

—vs.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

VICTOR IADAROLA,

Petitioner,

—vs.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

The State of New York requests that this Court deny the petition for a writ of *certiorari* brought by the petitioners, Victor and Benito Iadarola. The petitioners seek review of orders of the New York Supreme Court, Appellate Division, Second Department, unanimously affirming their convictions

for the crime of Enterprise Corruption (N.Y. Penal Law § 460.20 [McKinney 1989]).

OPINIONS BELOW

The opinions of the New York Supreme Court, Appellate Division, Second Department, in *People v. Benito Iadarola* and *People v. Victor Iadarola* are each reported at 634 N.Y.S.2d 738 (2d Dep't 1995) and are reprinted in the petitioners' appendix at 5a and 7a.

JURISDICTIONAL STATEMENT

The New York Court of Appeals entered its orders, denying the petitioners' application for permission to appeal, on December 20, 1995. The petitioners filed their petition for *certiorari* in this Court on March 19, 1996, which is within the statutory time period. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment

> [N]or [shall any person] be deprived of life, liberty, or property without due process of law . . . .

United States Constitution, Sixth Amendment

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

United States Constitution, Fourteenth Amendment

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

The Trial

The People's Case

On November 1, 1988, Sergeant Ronald Rose and a team of detectives from the Brooklyn North Public Morals District commenced an investigation into an illegal gambling operation at 320 Lafayette Street in Brooklyn, New York. This investigation eventually led to the discovery of a large, well-organized, and vastly profitable illegal gambling business operating in Brooklyn.

The business was run by petitioner Victor Iadarola and codefendant Hali Polanco. Victor Iadarola's brother, petitioner Benito Iadarola, was Victor's chief assistant. The Iadarolas participated in or directed illegal gambling activities at more than fifty locations throughout Brooklyn. The enterprise controlled its gambling spots in one of three ways: the enterprise would be fully responsible for operating the spot, providing personnel and equipment for the operation, including betting slips, telephones, facsimile machines, and tape recorders; or, the enterprise would pay rent for a storefront location such as a bodega, reaping a percentage of the spot's earnings from the store owner; or, the enterprise would require a storefront owner who wished to conduct policy gambling within his store to pay "protection money," a fee extorted from the store owner to ensure that the store would not be jeopardized by acts of violence perpetrated by organized crime.

So profitable was the enterprise that the petitioners would forego control of any gambling spot that did not realize weekly receipts of at least $5,000 to $7,000. It is estimated, conservatively, that during a two and one-half year period from February 1, 1989 to July 12, 1991, the enterprise realized total receipts in excess of eighteen million dollars.

In telephone conversations that were electronically recorded, petitioner Victor Iadarola acknowledged his criminal activity and expressed his fear that he would be sent to jail for his crimes. For example, in a telephone conversation with his daughter Annemarie Iadarola on October 13, 1989, Victor complained that the Federal Bureau of Investigation (hereinafter "F.B.I.") was following him. When Annemarie asked why, Victor responded, "Annemarie, I'm not selling bibles, am I" (Call number 1803). During a telephone conversation with his wife Rose on November 3, 1989, Victor said, "I got the F.B.I. on me all fucking day," and "I'm going to jail" (Call number 4354). During a telephone conversation with Special Agent Richard Leahy of the F.B.I. on June 4, 1990, Victor stated, "Yeah, well, I'm a hood myself . . . . let's stop kidding ourselves. I made money too, understand?" (Call number 727).

The Defense Case

The petitioners called Special Agent RICHARD LEAHY and Special Agent GARY DRAUS of the F.B.I. to testify in their behalf. The agents stated that, in 1981, the petitioners began providing information to the F.B.I. as confidential informants (Draus: V.5023-24; Leahy: VI.5331, 5364, 5430-31, 5435-36, 5465).[1] Two years later, in 1983, the F.B.I. discontinued the petitioners as confidential informants (Draus: V.5205, VI.5307-09; Leahy: VI.5490-91, 5533-34).[2] The F.B.I. discontinued Victor Iadarola at his request and discontinued Benito Iadarola due to his lack of productivity (Draus: V.5205, VI.5307-09; Leahy: VI.5533-34, 5593-94).

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[1] The trial testimony is contained in volumes numbered I to VII. References to pages of the trial transcript appear in parentheses, preceded by the respective volume number of the transcript and name of the witness whose testimony is being cited.

[2] Contrary to the assertion in the petitioners' brief, the petitioners did not "remain[ ] confidential informants over a period of ten years" (Petitioners' Brief at 4).

Petitioner Victor Iadarola was reactivated as a confidential informant in 1986 and Benito Iadarola was reactivated as a confidential informant in 1988 (Draus: VI.5323; Leahy: VI.5374-75, 5492, 5535).

Over the years, in accordance with the United States Attorney General's guidelines for the conduct of informants, agents of the F.B.I. repeatedly advised the petitioners that they were not agents or employees of the F.B.I., that they were not to participate in any crimes, and if they did so, they were subject to criminal prosecution (Draus: V.5173-75, 5189-92, VI.5286-89; Leahy: VI.5471-76, 5478-79, 5598-99).

Indeed, while the petitioners were confidential informants for the F.B.I., they were prosecuted by the State. In May of 1981, the petitioners were indicted by the Kings County District Attorney's Office for possession of gambling records (Leahy: VI.5336-37, 5365, 5367, 5464, 5480). Special Agent Leahy told the District Attorney's Office that the Iadarolas were providing information to the F.B.I. and he asked for leniency for them on the gambling charges (Leahy: VI.5336-37, 5368, 5370, 5470, 5480-84). The District Attorney's Office recommended that each of the petitioners be permitted to plead guilty to a misdemeanor gambling charge in full satisfaction of the indictment (Leahy: VI.5484-85).[3]

Petitioner Benito Iadarola testified in his own behalf. He alleged that in February, 1981, Special Agent Leahy told him and his brother to "stay in the gambling business", and that in 1988, Special Agent Draus told him and his brother to "stay

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[3] Contrary to the assertion in the petitioners' brief, there is no evidence that the F.B.I. ever "supervised petitioners on behalf of the District Attorney" (Petitioners' Brief at 4). Indeed, while Agent Draus was handling the petitioners from 1988 to 1990, Agent Draus admitted that he tried to prevent the District Attorney's Office from learning that the Iadarolas were his informants (Draus: V.5061-62, 5065, 5105-07, 5111, 5119-20, 5152, 5199, 5202-03).

into the number game" (Iadarola: VI.5648-50).[4] However, he conceded that he was not engaged in public service (Iadarola VI.5653). In addition, he admitted that he had been involved in illegal gambling for some time before he became an informant for the F.B.I. (Iadarola: VI. 5651, 5654).

The Rebuttal Case

In rebuttal, the People introduced two telephone conversations which had been electronically recorded. On June 1, 1990, in a telephone conversation with a woman named Laura, petitioner Victor Iadarola said,

> A lot of lawyers and people are very ignorant, you know, they come up with these sneaky laws that they could come into your house, get a court order, search your house if you're doing gambling or anything like that, get all the records and anything that you've written on that's pertaining to gambling or anything, and lock you up. . . . With all the coke and this and that going on, they have to blame the, they have to put it on gambling something, you know? This is a new law, just read it in the paper again. They made a big raid in Queens, this, that, something. . . . Yeah, we, nobody knew. This law was in effect, I would've, ha, adios. But that's the way life goes.

(VII.5700; Call number 634).

On June 4, 1990, after receiving two telephone calls from Special Agent Leahy, Victor Iadarola told codefendant Hali Polanco that he had received a call from "our friend"—apparently referring to Leahy—and that "he's reaching. Understand?" Victor Iadarola added, "You know, I, every possible way that I could beat these motherfuckers, I'm trying. You

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[4] Contrary to the assertion in the petitioners' brief (Petitioners' Brief at 6), Benito Iadarola never testified that the F.B.I. "authorized" him to continue illegal activities.

know what I mean?" and "Look, it's bargain time, you understand?" (VII.5701; Call number 728).

The Court's Charge

During the trial, petitioner Victor Iadarola requested a special charge on intent. He asked the court to instruct the jury that "if a person engages in conduct which violates a criminal statute, with the reasonable belief that he or she is acting as an authorized agent to assist in law enforcement activity, then that person may not be convicted of violating the criminal statute because the required criminal intent is lacking" (Victor Iadarola's Appellate Division brief, Exhibit A). The trial court denied the request, concluding that the petitioners' alleged belief did not in any way negate their intent to commit the crimes charged (VI.5450, 5515-16).

However, the trial court did charge the jury on the justification defense set forth in New York Penal Law § 35.05(1). The court instructed the jury that conduct that would otherwise constitute an offense was justifiable and not criminal where such conduct is performed by a public servant in the reasonable exercise of his official powers, duties, or functions (Charge: VII.94). The trial court defined a public servant as any person exercising the function of a public officer or employee, even if the person was not "on the payroll of the particular agency" (Charge: VII.96).

The Verdict and Sentence

On May 17, 1994, the jury convicted each petitioner of one count of Enterprise Corruption (N.Y. Penal Law § 460.20 [McKinney 1989]). On July 6, 1995, the court sentenced petitioner Victor Iadarola to a prison term of three and one-third to ten years, and sentenced petitioner Benito Iadarola to a prison term of two to six years.

The State Appeal

The petitioners appealed to the New York Supreme Court, Appellate Division, Second Department (hereinafter "Appellate Division"). In his brief, petitioner Victor Iadarola claimed, *inter alia*, that the trial court had committed reversible error because the court refused to give the intent instruction that he had requested during trial. In his brief, petitioner Benito Iadarola claimed, *inter alia*, that the trial court had committed reversible error because the court did not charge the jury that the petitioners should be acquitted if they reasonably believed that they were authorized to engage in criminal activity in their roles as government informants.

The Appellate Division affirmed the petitioners' convictions. With respect to the intent claim raised by petitioner Victor Iadarola, the Appellate Division held:

> Contrary to the defendant's contention, the trial court properly denied the defendant's request to charge the jury that he lacked the intent to commit the crimes with which he was charged because, as a confidential informant, he had a reasonable belief that the Federal Bureau of Investigation (hereinafter the F.B.I.) had given him the authority to commit those crimes. There is no proof that the defendant did not intend to participate in the gambling enterprise with which he was charged. However, in view of the fact that the defendant presented evidence suggesting that he was an F.B.I. informant, the trial court properly instructed the jury that, if it found the defendant guilty of the crime of enterprise corruption, it should then consider whether the defendant's actions were justified pursuant to Penal Law § 35.05(1), which provides in pertinent part that criminal conduct is justified and not criminal if it is performed by a public servant in the reasonable exercise of his duties.

People v. Victor Iadarola, 634 N.Y.S.2d 738, 739 (2d Dep't 1995).

With respect to the "reasonable belief" defense raised by petitioner Benito Iadarola, the Appellate Division held:

> The defendant argues, similarly to his co-defendant (*see*, *People v. Victor Iadarola*, ___ A.D.2d ___, 634 N.Y.S.2d 738 [decided herewith]), that the trial court erred by failing to instruct the jury that he should be acquitted if he reasonably believed that the Federal Bureau of Investigation (hereinafter the F.B.I.) had authorized him to engage in criminal activities in connection with his role as a confidential informant. This defense, as set forth in *United States v. Abcasis*, 45 F.3d 39, has no basis in New York law. The trial court properly and adequately instructed the jury that, if it found the defendant guilty of the crimes with which he was charged, it should then consider whether the defendant's actions were justified pursuant to Penal Law § 35.05(1), which provides in pertinent part that criminal conduct is justified and not criminal if it is performed by a public servant in the reasonable exercise of his duties. In any event, no reasonable view of the evidence that was adduced at trial supports this defense.

People v. Benito Iadarola, 634 N.Y.S.2d 738 (2d Dep't 1995).

The petitioners applied, pursuant to New York Criminal Procedure Law §§ 460.10(5) and 460.20, for permission to appeal from the Appellate Division's decisions to the New York Court of Appeals. On December 20, 1995, Judge Howard A. Levine of the New York Court of Appeals denied their requests for permission to appeal.

REASONS WHY THE WRIT SHOULD BE DENIED

POINT I

THE PETITIONERS' JUSTIFICATION CLAIM IS BEYOND THE SCOPE OF THIS COURT'S REVIEW, DOES NOT RAISE AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW, AND LACKS MERIT.

The petitioners' application for a writ of *certiorari* should be denied. The petitioners claim that the state trial court erroneously failed to submit a defense.[5] However, this Court does not have jurisdiction to review this claim. Furthermore, this claim does not present an important issue of constitutional law. Moreover, this claim is utterly meritless. Therefore, this claim presents no reason for this Court to grant the petitioners further review.

First, the petitioners' application for a writ of *certiorari* should be denied because the petitioners' claim raises only a question of state law, not a question of federal constitutional law. In his direct appeal to the Appellate Division, petitioner Benito Iadarola argued that his conviction should be reversed because the trial court failed to charge the jury that the petitioners should be acquitted if the petitioners reasonably believed that the F.B.I. had authorized them to engage in criminal activities in connection with their role as confidential informants. The Appellate Division rejected this claim, observing that the suggested charge "has no basis in New York law." *People v. Benito Iadarola*, 634 N.Y.S.2d 738 (2d Dep't 1995). The Appellate Division noted that, instead, the trial court had correctly apprised the jury on the justification defense which is set forth in New York Penal Law § 35.05(1).

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[5] In their first point, the petitioners also contend that the trial court's intent charge was constitutionally defective (Petitioners' Brief at 11, 13). The petitioners' claim concerning the intent charge is discussed in Point II, *infra*.

The trial court instructed the jury that conduct that would otherwise constitute an offense is justifiable and not criminal where such conduct is performed by a public servant in the reasonable exercise of his official powers, duties or functions (Charge: VII.94). The trial court defined a public servant as any person exercising the function of a public officer or employee, even if the person was not "on the payroll of the particular agency" (Charge: VII.96).

The petitioners now claim that their rights under the Fifth, Sixth, and Fourteenth Amendments were violated by the trial court's failure to charge the jury on this "reasonable belief" defense. However, this claim presents no issue of constitutional law. The definition of state crimes and state defenses is ordinarily a matter of state law. *See Patterson v. New York*, 432 U.S. 197, 210 (1977). This rule should certainly apply to a defense of justification. As this Court has observed, "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas*, 392 U.S. 514, 536 (1968).

Obviously, this Court has the power to strike down criminal statutes which violate some specific provision of the Constitution. For example, this Court has struck down statutes which violate the First Amendment (*Texas v. Johnson*, 491 U.S. 397 [1989]); the Equal Protection Clause (*McLaughlin v. Florida*, 379 U.S. 184 [1964]); the Cruel and Unusual Punishment Clause (*Robinson v. California*, 370 U.S. 660 [1962]), and the constitutional right to privacy (*Griswold v. Connecticut*, 381 U.S. 479 [1965]). In addition, this Court has struck down criminal statutes which are so vague that they fail to give persons of ordinary intelligence fair notice of what is forbidden by the statutes. *Papachristou v. City of Jack-*

sonville, 405 U.S. 156 (1972). But the petitioners have never alleged that New York State's justification statute violates any of these precepts.

Moreover, while the due process clause imposes some outer boundaries on the conduct that a State can criminalize (*see Cox v. State of Louisiana*, 379 U.S. 559, 571 [1965]), the scope of the due process clause beyond those protections conferred by the Bill of Rights is quite limited. *See Dowling v. United States*, 493 U.S. 342, 352 (1990) ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation"). Here, where the petitioners were given a justification defense which was very similar to the defense the petitioners now raise,[6] the due process clause should have no application.

In sum, the petitioners urge this Court, in essence, to overrule the choices made by the New York State Legislature and redefine the substantive content of New York criminal law. Because the scope of the New York justification defense is a matter of New York state law, this case does not present a substantial federal constitutional issue for this Court to review.

Second, even if the petitioners' claim raised a substantial federal constitutional issue, the petitioners' claim cannot be reviewed in this case because the state courts never ruled on any federal constitutional issue. The Supreme Court has no jurisdiction to exercise its appellate power over state court judgments, unless a federal question has been decided in the state courts below. *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Street v. New York*, 394 U.S. 576, 581-82 (1969); *see Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

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[6] In fact, at least one commentator has suggested that the justification defense set forth in New York Penal Law 35.05(1) may apply to a person who acts on a reasonable, but mistaken, belief that his or her behavior is legal. American Law Institute, Model Penal Code and Commentaries, Part I, § 3.03, pages 29-30, n.19 (1985).

When the highest state court "has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. at 582.

In this case, the Appellate Division never addressed the question whether the trial court's failure to submit the defense violated the Fifth, Sixth, or Fourteenth Amendments of the Federal Constitution. Instead, the Appellate Division ruled only that the trial court properly did not submit the defense on the basis of state law. *People v. Benito Iadarola*, 634 N.Y.S.2d at 738.

The Appellate Division correctly refused to consider the petitioners' constitutional claim, because the claim was unpreserved for appellate review. Under New York law, in order to preserve a constitutional issue for appellate review, a criminal defendant must timely and specifically raise the constitutional claim in the trial court. *See* N.Y. Crim. Proc. Law § 470.05(2) (McKinney 1994); *People v. Udzinski*, 146 A.D.2d 245, 248-52, 541 N.Y.S.2d 9, 11-14 (2d Dep't 1989). In this case, the petitioners' counsel never alluded to any federal constitutional provision during their discussions about the court's charge. Thus, under New York law, the petitioners' constitutional claim was unpreserved. *See People v. Voliton*, 83 N.Y.2d 192, 195-96, 608 N.Y.S.2d 945, 947, 630 N.E.2d 641, 643 (1994) (court refused to consider defendant's due process claim, because defendant failed to raise claim in trial court); *People v. Qualls*, 55 N.Y.2d 733, 447 N.Y.S.2d 149, 431 N.E.2d 634 (1981) (court refused to review defendant's confrontation clause claim because defendant raised only evidentiary claim in trial court); *People v. Dozier*, 52 N.Y.2d 781, 436 N.Y.S.2d 620, 417 N.E.2d 1008 (1980) (court refused to consider constitutional issues that were not specifically raised in trial court).

Although the Appellate Division does have the discretion to review unpreserved claims in the interest of justice (*see* N.Y. Crim. Proc. Law § 470.15[6][a] [McKinney 1994]; *People v. Cona*, 49 N.Y.2d 26, 33, 424 N.Y.S.2d 146, 149, 399 N.E.2d 1167, 1169 [1979]), this power "is not invoked routinely." *Martinez v. Harris*, 675 F.2d 51, 54 (2d Cir.) (citation omitted), *cert. denied*, 459 U.S. 849 (1982). In light of the Appellate Division's silence on the petitioners' federal constitutional claim, this Court should conclude that the Appellate Division refused to review this claim because it was unpreserved. *See Coleman v. Thompson*, 501 U.S. at 732-40; *Epps v. Commissioner of Correctional Services*, 13 F.3d 615, 618-19 (2d Cir.), *cert. denied*, 114 S. Ct. 1409 (1994).

Third, the petitioners' application for a writ of *certiorari* should be rejected because this claim does not raise an important issue of law. As one of the petitioners' counsel observed during trial, the public servant justification defense set forth in Penal Law § 35.05(1) is rarely raised in New York (VI.101). In light of the extremely limited impact that a decision on this issue will have, this claim does not present a significant issue of constitutional law for this Court to resolve.

Fourth, this Court should not issue a petition for a writ of *certiorari* in this case because the petitioners' claim is meritless. New York State's failure to recognize a "reasonable belief" defense does not violate the federal constitution. On the contrary, the New York State Legislature reasonably chose not to recognize this defense. A "reasonable belief" defense "is an invitation to excess, encouraging officers to overstep the boundaries of their powers because it will be impossible, or very difficult, to show that their beliefs about limits (often very vague limits) were unreasonable." American Law Institute, Model Penal Code and Commentaries, Part I, § 3.03, page 30 (1985). Therefore, New York State was not constitutionally required to adopt such a defense.

In any event, the evidence introduced at trial did not support this defense. Special Agents Gary Draus and Richard Leahy testified that the petitioners were repeatedly informed, in accordance with the Attorney General's Guidelines, that the petitioners were not agents of the F.B.I., that they were not permitted to engage in any criminal activity, and that, if they did engage in criminal activity, they could be prosecuted (Draus: V.5173-75, 5189-92, VI.5286-89; Leahy: VI.5471-76, 5478-79, 5598-99). Although Benito Iadarola testified that Agents Draus and Leahy had told him to stay in the gambling business (Iadarola: VI.5648-50), he never disputed that he had been repeatedly warned over the course of years that he could face prosecution for his actions. Indeed, in 1981, the State prosecuted the petitioners for a gambling offense, despite the fact that they were F.B.I. informants at that time. Under these circumstances, no reasonable person could have believed that the petitioners had immunity to operate a multi-million dollar gambling operation in violation of the laws of the State of New York.

Furthermore, statements made by Victor Iadarola, which were recorded on audiotape, unequivocally established that the petitioners did not believe that they had permission from the F.B.I. to operate their gambling empire. In telephone conversations with family members and business associates, Victor Iadarola observed that he was "not selling bibles," said that he would have quit the gambling business earlier had he known about New York's enterprise corruption statute, and predicted that he was "going to jail" (Call numbers 1803, 4354, 634, 727). In a recorded conversation with Agent Leahy, Victor Iadarola admitted, "Yeah, well, I'm a hood myself . . . . let's stop kidding ourselves. I made money too, understand?" (Call number 727). In a conversation with codefendant Hali Polanco, Victor Iadarola said, "Look, it's bargain time, you understand?" (Call number 728). Obviously, had Victor Iadarola actually believed that he and his brother had permission to operate a gambling operation in New York, he

would have made none of these comments. Thus, as the Appellate Division held, no reasonable view of the evidence supported the petitioners' contention that they reasonably believed that they had been given permission by the F.B.I. to run a multi-million dollar gambling operation in New York.

For all of these reasons, petitioners' claim regarding the scope of New York State's justification defense does not provide any reason for this Court to issue a writ of *certiorari*. Therefore, this petition should be denied.

POINT II

THE PETITIONERS' CLAIM CONCERNING THE TRIAL COURT'S INTENT CHARGE IS BEYOND THE SCOPE OF THIS COURT'S REVIEW, DOES NOT RAISE AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW, AND LACKS MERIT.

This Court should also refuse to review the petitioners' related claim that the trial court's intent charge violated the petitioners' rights under the Fifth, Sixth, and Fourteenth Amendments. The petitioners contend that the trial court's intent charge was constitutionally insufficient because the trial court refused to give the following instruction: the jury should conclude that the petitioners lacked the intent to commit the crime charged if the petitioners reasonably believed that the Federal Bureau of Investigation had given them the authority to commit that crime. Like the petitioners' justification claim, the petitioners' intent claim is beyond the scope of this Court's jurisdiction, does not raise an important issue of law, and is substantively meritless.

The petitioners' claim is beyond the scope of this Court's review because the claim does not raise a federal constitutional question. The content of a state court's jury instructions is ordinarily a matter of state law. *United States ex rel. Smith*

v. Montanye, 505 F.2d 1355, 1359 (2d Cir. 1974), *cert. denied*, 423 U.S. 856 (1975); *see Cupp v. Naughten*, 414 U.S. 141, 146 (1973). Because the petitioners' claim raises only an issue of state law, this Court does not have jurisdiction to review the claim. *See* 28 U.S.C. § 1257(a).

This claim is also beyond the scope of this Court's review because the state courts never ruled on any federal constitutional issue. *See supra*, at 12-14; *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Street v. New York*, 394 U.S. 576, 581-82 (1969). The Appellate Division never addressed the question of whether the trial court's refusal to give the requested intent instruction violated the petitioners' Fifth, Sixth, and Fourteenth Amendment rights. *People v. Victor Iadarola*, 634 N.Y.S.2d 738 (2d Dep't 1995).

As noted before, when the highest state court "has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. at 582. Here, the record unequivocally shows that the petitioners failed to raise the issue properly in state court. When Victor Iadarola's counsel requested the instruction, he did not refer to any constitutional provision or otherwise alert the trial court to any federal constitutional issue. Therefore, under New York law, the petitioners' constitutional claim was not preserved for appellate review.[7] *See People v. Voliton*, 83 N.Y.2d 192, 195-96, 608 N.Y.S.2d 945, 947, 630 N.E.2d 641, 643 (1994); *People v. Qualls*, 55 N.Y.2d 733, 447 N.Y.S.2d 149, 431 N.E.2d 634 (1981); *People v. Dozier*, 52 N.Y.2d 781, 436 N.Y.S.2d 620, 417 N.E.2d 1008 (1980). Because there is

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[7] Although Victor Iadarola's counsel cited to *United States v. Barker*, 546 F.2d 940 (D.C. Cir. 1976) in support of his charge request, this citation was not sufficient to alert the trial to any constitutional issue. *United States v. Barker* addresses only the scope of the mistake of law and mistake of fact defenses under federal law.

an independent and adequate state ground for the Appellate Division's failure to consider the petitioners' constitutional claim, this claim cannot be reviewed by this Court. *See Coleman v. Thompson*, 501 U.S. 722, 729, 737-40 (1991).

Furthermore, the petitioners' claim does not raise an important issue of law for this Court to review. Insofar as respondent is aware, there are no other federal or state cases which address whether the proposed intent charge is constitutionally required. Indeed, since the proposed charge is based on the extremely unusual facts of this case, it is unlikely that this issue has ever arisen before. Consequently, this case does not present a significant question of law for this Court to resolve.

Finally, the petitioners' application for a writ of *certiorari* on the basis of this claim should be rejected because the petitioners' claim is specious. Before a federal court may overturn a conviction based on a state trial court's charge, it must be established that the absence of the requested instruction is not only "undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment." *Cupp v. Naughten*, 414 U.S. at 146; *see Henderson v. Kibbe*, 431 U.S. 145, 154-55 (1977).

Here, the trial court properly refused to give the requested instruction, because that instruction was incorrect as a matter of law and logic. The petitioners' proposed charge would have instructed the jury that, if the jury accepted the petitioners' claim that the F.B.I. had authorized them to commit the crime, the jury must conclude that the evidence was insufficient to establish their intent to commit the crime. However, this instruction was completely wrong. The petitioners' alleged belief in their own authorization had absolutely nothing to do with the intent required to commit the charged crime. In order to prove the intent element of the crime of Enterprise Corruption, the State had to establish that the petitioners intentionally conducted or participated in the affairs

of an enterprise or that the petitioners intentionally acquired or maintained an interest in or control of the enterprise.[8] N.Y. Penal Law § 460.20(1) (McKinney 1989). Because the petitioners' alleged belief that they had been authorized to commit the crime was completely irrelevant to whether the petitioners intentionally participated in the affairs of the enterprise or intentionally maintained an interest in the enterprise, the trial court's refusal to give the instruction certainly did not amount to a federal constitutional violation.

For all of these reasons, the petitioners' claim concerning the trial court's intent charge provides no basis for this Court to grant a writ of *certiorari*.

POINT III

THE APPELLATE DIVISION DID NOT DISTURB THE RULE THAT AN ACCUSED IS ENTITLED TO ANY RECOGNIZED DEFENSE THAT IS SUPPORTED BY EVIDENCE.

Finally, this Court should reject the petitioners' claim that their cases should be reviewed because the Appellate Division "unsettle[d]" the fundamental precept that an accused is entitled to an instruction about any recognized defense which is supported by the evidence (Petitioners' Brief at 15-19). The Appellate Division's decision did not disturb this rule of law. On the contrary, the Appellate Division applied this rule of law.

The Appellate Division held that the petitioners were not entitled to the "reasonable belief" defense, because it was not a defense recognized in New York. *People v. Benito Iadarola*, 634 N.Y.S.2d 738 (2d Dep't 1995). Furthermore, the Appel-

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[8] Contrary to the petitioners' assertion (Petitioners' Brief at 16 n.10), Enterprise Corruption is not a specific intent crime.

late Division held that, in any event, no reasonable view of the evidence supported this defense.[9] *Id.*

While the petitioners may not agree with how the Appellate Division applied this rule to the particular facts of their case, the Appellate Division did not disregard or reject this fundamental principle. Therefore, this claim does not provide any constitutional issue for this Court to resolve.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES J. HYNES
District Attorney
Kings County

ROSEANN B. MACKECHNIE
VICTOR BARALL*
ANN BORDLEY
Assistant District Attorneys
of Counsel

210 Joralemon Street
Brooklyn, New York 11201
(718) 250-2000

**Counsel of Record for Respondent*

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[9] The New York Court of Appeals has held that, in determining whether a reasonable view of the evidence supports a defense, a state court must view the evidence in the light most favorable to the defendant. *See People v. Farnsworth*, 65 N.Y.2d 734, 492 N.Y.S.2d 12, 481 N.E.2d 552 (1985).